U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. TUERS and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, CA

Docket No. 03-146; Submitted on the Record;
Issued March 24, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has greater than a 46 percent permanent impairment of his left upper extremity and a 46 percent impairment of his right upper extremity, for which he has received schedule awards; and (2) whether the Office of Workers' Compensation Programs abused it discretion by denying appellant's request for further consideration on the merits under 5 U.S.C. § 8128(a).

On September 24, 1992 appellant, then a 48-year-old modified letter carrier, sustained bilateral carpal tunnel syndrome. He underwent bilateral carpal tunnel releases, bilateral reflex sympathetic dystrophy (RSD) and bilateral shoulder impingement syndromes for which surgery was authorized. Also accepted were a left shoulder rotator cuff tendinitis and a right shoulder sprain. Appellant additionally underwent left shoulder rotator cuff repair. He received appropriate compensation benefits.

On July 24, 1993 appellant filed a Form CA-7 claim for a schedule award.

On December 11, 1995 the employing establishment offered appellant a modified city carrier position and appellant returned to modified-duty work.

On March 30, 1996 the Office granted appellant a schedule award for 20 percent impairment of each upper extremity for the period January 7, 1996 to May 29, 1998 for a total of 124.80 weeks of compensation.[1]

On February 9, 1998 appellant claimed an additional schedule award, noting that he had chronic bilateral finger joint pain and burning, tendon contractures bilaterally, loss of sensitivity in fingertips, the ability to perform fine manipulation without pain bilaterally, loss of grasping bilaterally and loss of strength bilaterally. He alleged that he had chronic bilateral shoulder joint pain and could not work above his shoulders without severe pain. On March 5, 1998 appellant completed a Form CA-7 requesting an additional schedule award.

[1] The total number of weeks was calculated by taking 20 percent of 312 weeks (62.4 weeks) and multiplying by 2 since the impairment was bilateral.

On April 24, 1998 the Office referred appellant for a second opinion examination to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon. By report dated May 20, 1998, Dr. Swartz reviewed appellant's factual and medical history, indicated the results of his physical examination and testing and reported range of motion testing results. He did not provide any impairment estimate under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On July 16, 1998 an Office medical adviser, Dr. Ellen Pichey, reviewed the clinical findings obtained by Dr. Swartz and applied the A.M.A., *Guides*, fourth edition, to find that appellant had a total of 46 percent impairment of each upper extremity. Dr. Pichey found that appellant had 1 percent for loss of flexion, 1 percent for loss of extension, (Figure 38, page 43) 4 percent for loss of abduction, 0 percent for loss of adduction (Figure 41, page 44), 5 percent for loss of internal rotation and 1 percent for loss of external rotation (Figure 44, page 45) for a total of 12 percent permanent impairment due to loss of range of motion. She found that impairment due to loss of strength and due to sensory impairment and pain were a Grade 2, 25 percent (Table 11, page 48 and Table 12, page 49) and noted that with the maximum impairment based on the musculocutaneous and suprascapular nerves was 49 percent (Table 15, page 54) and calculated that appellant had a 12 percent impairment. Dr. Pichey found that appellant had impairment due to entrapment neuropathy that was moderate to severe, which was 30 percent as per Table 16, page 57. Dr. Pichey combined appellant's losses due to range of motion with impairment due to loss of strength and sensory deficit and pain and then combined impairment due to entrapment neuropathy. Applying the Combined Values Chart, page 322, she determined that the total permanent for each upper extremity was 46 percent. Dr. Pichey noted the date of maximum medical improvement as December 1, 1997.

On July 22, 1998 the Office granted appellant additional schedule awards for 26 percent additional permanent impairment of each upper extremity for the period May 30, 1998 to December 18, 1999 for a total of 81.12 additional weeks of compensation.[2]

On January 25, 2001 appellant filed a claim alleging that he sustained a recurrence of disability commencing January 1, 2001. He claimed that his hand pain and weakness was worse and he had lost the use of his hands.

By decision dated March 7, 2001, the Office also accepted that appellant sustained a recurrence of disability commencing January 1, 2001.

Appellant submitted a March 30, 2001 report from Dr. Paul A. Caviale, a Board-certified orthopedic surgeon specializing in upper extremities, who delineated his findings upon physical examination including range of motion test results, diagnosed "rule out recurrent carpal tunnel syndrome, Dupuytren's contractures, history of RSD, [and] continued pain in shoulders," and recommended that nerve conduction studies be obtained.

Appellant also submitted an April 16, 2001 report from Dr. Gary W. Platt, a Board-certified neurologist, who discussed his electromyogram findings, noting that they were relatively benign, and indicated that no abnormalities of appellant's peripheral nerve function were noted except for a slight abnormality, which was a slighter amplitude of the evoked

[2] The number of weeks of compensation was calculated by taking 26 percent of 312 (81.12 weeks). However, it does not appear that this was doubled to reflect the bilateral impairment to both upper extremities.

response, affecting the left median palmar nerve at the wrist and the index finger, which he felt might be a reflection of appellant's old history of carpal tunnel syndrome.

An April 25, 2001 form report from Dr. Caviale indicated that appellant was working without limitations, but had pain in his hands and shoulders. A July 3, 2001 CA-20 form report from Dr. Caviale indicated that appellant had permanent restrictions on lifting more than 45 pounds, pushing and pulling more than 60 pounds and working overhead.

On August 24, 2001 the Office referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, for another second opinion orthopedic examination, to Dr. Kenneth Lay, a Board-certified orthopedic surgeon.

By report dated October 8, 2001, Dr. Lay reviewed appellant's factual and medical history, noted that his current complaints, provided his results on examination and testing, and diagnosed bilateral carpal tunnel syndrome, status post carpal tunnel releases and bilateral shoulder impingement syndromes, status post arthroscopic surgery. Dr. Lay noted that appellant's shoulder pain was uncomfortable, that he lacked 10 degrees of bilateral forward elevation, that he lacked 5 degrees of bilateral abduction, and that he had mild finger and wrist discomfort which limited his grip strength. He found no evidence of RSD.

On November 12, 2001 Dr. Pichey reviewed Dr. Lay's report, applied the A.M.A., *Guides*, fifth edition, combining the impairment due to loss of range of motion and impairment due to sensory deficit or pain for the affected nerves and determined that appellant had no greater than a 29 percent bilateral permanent impairment. As appellant had already been granted schedule awards for a 46 percent bilateral permanent impairment, no further schedule award was due appellant.

By decision dated January 3, 2002, the Office rejected appellant's claim for an additional schedule award finding that the medical evidence of record did not demonstrate that he had any greater permanent impairment than that already granted.

By letter dated January 26, 2002, appellant requested reconsideration of the January 3, 2002 decision, contending that the Office did not follow proper procedure in referring him for a second opinion examination.

By decision dated March 28, 2002, the Office denied appellant's request for reconsideration, finding that the evidence submitted in support of his request was immaterial and insufficient to require reopening his case for further review on its merits. The Office explained that the rotational system of selecting physicians was only used with impartial medical examiners, that Dr. Lay was indeed Board-certified, that Dr. Lay was in good standing with the State of California, and that he provided objective data from which it could be determined that appellant now had less permanent impairment than that for which he had already received schedule awards. The Office also noted that the medical evidence provided by Drs. Caviale and Platt did not support any greater permanent impairment than that already granted as neither of them addressed the issue.

The Board finds that appellant has no greater than a 46 percent bilateral permanent impairment of his upper extremities.

The schedule award provisions of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[5] However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (fifth edition) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[7] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.

Dr. Swartz, the second opinion physician, provided measurements of degrees of motion and an accurate description of appellant's other symptomatology, including loss of strength and involved nerves, relevant to calculation of a schedule award, however, he did not provide any opinion as to appellant's impairment rating in accordance with the A.M.A., *Guides*. Board precedent is well settled, however, that when a physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based upon the application of the A.M.A., *Guides*, or when he does not provide any impairment rating at all, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[8]

In this case, the Office medical adviser, Dr. Pichey, explained her application of the A.M.A., *Guides* to the findings of Dr. Swartz, and determined that appellant had a total of 46 percent permanent impairment of each upper extremity. This represented an additional impairment of 26 percent for each upper extremity from the initial 1996 schedule award.

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[3] 5 U.S.C § 8101 *et seq.*; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.304.

[5] 5 U.S.C. § 8107(c)(19).

[6] 20 C.F.R. § 10.404 (1999).

[7] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[8] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980). Board cases are clear that if the attending physician does not utilize the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of any permanent impairment. *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

The medical evidence from Drs. Caviale, Platt and Lay submitted following Dr. Pichey's determination does not refer to the A.M.A., *Guides* nor provide any opinion as to appellant's degree of upper extremity permanent impairment. Therefore, these reports are of diminished probative value in determining the impairment rating for schedule award purposes. However, the objective findings from these reports were evaluated by Dr. Pichey and were noted to demonstrate a lesser degree of bilateral permanent impairment than that for which appellant has already received schedule awards. Relying on the objective findings from these reports and the fifth edition of the A.M.A., *Guides*, Dr. Pichey calculated that appellant had no greater than a 29 percent permanent impairment, which is less than the 46 percent permanent impairment previously determined. The Boards finds that appellant has no greater permanent impairment than 46 percent of each upper extremity. The Board notes, however, that the total number of weeks paid under the 1998 schedule award is in error, as it allowed only 81.12 weeks of compensation. This number of weeks represents the 26 percent impairment of 1 upper extremity. As appellant's impairment was bilateral, an additional 81.12 weeks of compensation was payable to represent bilateral impairment.

The Board further finds that the Office did not abuse its discretion by denying appellant's request for a further review of his case on its merits under 5 U.S.C. § 8128(a).

The Federal Register dated November 25, 1998 advised that effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

> "(b) The application for reconsideration, including all supporting documents, must:
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> (1) Be submitted in writing;
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> (2) Set forth arguments and contain evidence that either:
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> (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
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> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[9]

When a claimant fails to meet one of the above-mentioned standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[10]

In support of his January 26, 2002 reconsideration request appellant argued that Dr. Lay was unqualified, not selected under the rotational system and not Board-certified. He also argued that he was entitled to a referee opinion. The Board notes, however, that Dr. Lay is a

[9] 20 C.F.R. § 10.606(b)(1), (2).

[10] 20 C.F.R. § 10.608(b); *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

Board-certified[11] physician. As a second opinion physician, the rotational system for impartial medical specialist is not applicable in his selection,[12] as the Board has held that the Office has wide latitude in choosing a second opinion specialist. The Board further notes that there is no conflict in medical opinion evidence between appellant's treating physician and an Office physician that would create a conflict in medical opinion evidence. The latter submitted medical evidence merely documents improvement in appellant's permanent impairment.

Therefore, the Office properly conducted a review of these arguments, determined that they did not meet the requirements of 20 C.F.R. § 10.606(b)(1) or (2), because they were inaccurate and hence irrelevant, and that therefore they did not require a reopening of appellant's claim for further review on its merits. The Board finds that the Office did not abuse its discretion to deny further merit reconsideration.

Consequently, the decisions of the Office of Workers' Compensation Programs dated March 28 and January 3, 2002 are hereby affirmed, as modified.

Dated, Washington, DC
March 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[11] American Medical Association, *Directory of Physicians in the United States*, 35th edition.

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims; *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(a); *see also* FECA PM Chapter 3.500.3.